United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7429

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-7429

ANNE K. UNGER,

Plaintiff-Appellant,

—against—

JOHN L. HETTRICK, DAVID J. LAUB, MARINE MIDLAND BANKS, INC. AND PRICE WATERHOUSE & CO.,

Defendants-Appellees,

EDWARD W. DUFFY, CHARLES G. BLAINE, WM. WARD FOSHAY, ULRIC HAYNES, JR., ROBERT W. HUBNER, NORTHRUP R. KNOX, FELIX E. LARKIN, JOHN S. LAWSON, JAMES P. LEWIS, SOL M. LINOWITZ, WILLIAM A. LYONS, JAMES W. MCKEE, JR., ALLEN H. NEUHARTH, DAVID H. NORTHRUP, NATHAN R. OWEN, CORNELIUS W. OWENS, CLIFTON W. PHALEN, GERALD C. SALTARELLI, PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL, JOHN WILKIE, CHARLES A. WINDING AND GERALD B. ZORNOW,

Defendants.

BRIEF OF DEFENDANTS-APPELLEES

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Preliminary Statement

Plaintiff appeals from an order of the United States District Court for the Southern District of New York (Metzner, *J.*) dismissing this action as a class action, but permitting it to proceed as an individual action. The unreported memorandum order of the District Court appears at pages 59a-61a of the Appendix.

Plaintiff made no motion or application for deferral of the time to move for a class action determination.

Counterstatement of the Issues

1. Did the Court below properly dismiss the class allegations in the complaint where the plaintiff failed to make a timely motion for class determination as required by Fed. R. Civ. P. 23(c)(1) and local Civil Rule 11A(c), and where local Civil Rule 11A(d) expressly permits the Court, upon such a failure by plaintiff to move for class determination, to dismiss the action as a class action "in the exercise of its informed discretion"?

2. Was it an abuse of the discretion of the Court below to grant the defendants' motion to dismiss the class allegations in the complaint under local Civil Rule 11A(d), which expressly authorizes such dismissal at the Court's discretion, where the plaintiff (1) failed to move for class determination as required by the federal and local rules; (2) failed to apply during the time allowed for such motion for postponement of her duty to make such a motion; (3) failed to respond within the time prescribed by the rules to a defendant's interrogatories specifically addressed to class determination issues; and (4) failed even to initiate discovery bearing upon class determination which she now claims, without specification, she should have been allowed to pursue.

3. Is an order determining that an action should not proceed as a class action appealable where the action has been specifically permitted to proceed as an individual action and the individual plaintiff seeking appeal has failed to create a record showing that the action will be terminated if that ruling is allowed to stand?

Counterstatement of the Facts

Plaintiff sues, individually, as a purchaser and holder of the stock of Marine Midland Banks, Inc. ("Marine Midland") and, by the class action device, on behalf of "all persons similarly situated who purchased the stock of Marine Midland Banks, Inc. during the period of wrongful conduct alleged . . . and who have suffered damages as the result thereof." (5a)* The complaint alleges transgressions by defendants of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j), Rule 10b-5 (17 C.F.R. § 240.10b-5) and the common law, occurring "since in or about 1973" to date in connection with certain specifically identified portions of annual reports, and with financial statements and filings with the Securities and Exchange Commission and other regulatory agencies. (8a, 15a-20a) Plaintiff specifically alleges that her claims are "typical" of claims of "all class members" (6a) and specifies in detail alleged "common questions of law and fact." (6a)

The complaint was filed on January 29, 1976, served on defendant Marine Midland on February 5, 1976, and thereafter served on defendants Hettrick and Laub.

Twenty days later, on February 25, 1976, those defendants answered the complaint, denying the material allegations thereof and, at the same time, served interrogatories pursuant to Rule 33 (the "February 25 interrogatories") for the purpose of eliciting from plaintiff the alleged factual basis for the various assertions in her complaint. (35a)

On February 23, 1976, defendant Price Waterhouse & Co. had served a set of interrogatories on plaintiff (the "Price Waterhouse interrogatories") concerned in substantial part

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* Unless otherwise indicated, page references are to plaintiff's Appendix on appeal.

with matters relating to whether this action could be maintained as a class action. (35a, 22a *et seq.*)

During the sixty day period following the filing of the complaint, plaintiff's counsel did not move for class determination. They did not make any application or motion to be relieved of that obligation or to have the time prescribed by the rules enlarged. They did not answer or respond to the Price Waterhouse interrogatories, which were directly pertinent to the issue of class determination, or even ask for an extension of time to address them. They did not institute any discovery bearing upon class determination which they now claim, without specification, they should have been allowed to pursue. In fact, plaintiff and her counsel did absolutely nothing during that sixty days (and thereafter) except seek and receive two 30-day extensions of time, first to April 23, then to May 24, to address the substantive interrogatories served by Marine Midland.

On April 28, 1976, eighty-nine days after the complaint had been filed, defendants Marine Midland, Laub, Hettrick and Price Waterhouse served notices of motion under Civil Rule 11A of the District Court to dismiss this action as a class action (32a, 38a) on the ground that plaintiff had failed to move for a class determination as required by Fed. R. Civ. P. 23(c)(1) and local Civil Rule 11A(c). (34a-37a) At that time, plaintiff was twenty-nine days in default under Rule 11A and thirty-five days in default regarding the Price Waterhouse interrogatories.*

In her response to the motion to dismiss the class allegations, plaintiff conceded that there had clearly been an

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* Objections and answers to interrogatories were finally served on May 26, 1976 while the motion at issue on this appeal was *sub judice*. *See* Brief of Plaintiff-Appellant ("Brief") at 7.

omission upon plaintiff's part to move for class action determination as provided for by Civil Rule 11A(c). (44a) The explanation offered was "inadvertence". (44a) Nevertheless, plaintiff proceeded to urge the District Court not only to ignore the admitted neglect, but to approve still further indefinite delay in the prosecution of the case. Without actually submitting a cross-motion for postponement, plaintiff counsel asserted, in bar of the proposed motion to dismiss, that "this case is not presently ripe for class action determination; and that such determination should be deferred by [the District] Court until an appropriate future time", pending the completion of discovery proceedings. (44a, 50a, 53a)

Plaintiff did not even try to explain just what discovery was supposedly necessary to her claim to class action status, much less propose any specific discovery and ask leave to proceed with it.

On August 5, 1976, the District Court granted defendants-appellees' motion to dismiss the class allegations, noting, however, that the action might still "be maintained as an individual action." (61a) In his memorandum decision and order, Judge Metzner focused on the fact that

> "Civil Rule 11A emphasizes "an *early* determination of whether the action is properly a class action 'and, if so, the membership of the class'" *Wolfson* v. *Solomon*, 54 F.R.D. 584 (S.D.N.Y. 1972) (emphasis in the original). The rule implements the requirement of Rule 23(c)(1), Fed. R. Civ. P. that '[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.'" (60a)

The Court went on to reject plaintiff's contention that any supposed need for discovery somehow justified her dereliction:

> "Discovery by plaintiff is not necessary to determine class action status. Plaintiff knows her relationship to the alleged wrongdoing. Class action orders are always subject to change as discovery proceeds. Rule 23(c)(1), Fed. R. Civ. P." (60a)

On that basis the Court concluded that "sufficient reason has not been given for plaintiff's failure to comply with the rules" (60a), and that accordingly the action should be dismissed as a class action.

ARGUMENT

I.

The District Court Properly Dismissed The Class Allegations In The Complaint For Failure By Plaintiff To Move For A Class Determination As Required By The Federal And Local Civil Rules.

A. The Court Was Authorized to Dismiss the Class Allegations

Rule 23(c)(1) of the Federal Rules of Civil Procedure declares that, "[*a*]*s soon as practicable* after the commencement of an action brought as a class action, the Court *shall* determine by order whether it is to be so maintained." (Emphasis supplied) The United States District Court for the Southern District of New York, pursuant to Fed. R. Civ. P. 83, has implemented that requirement through Civil Rule 11A of its Rules, which reads in pertinent part as follows:

> "(c) Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim *shall move* for a determination under Fed. R. Civ. P. 23(c)(1) as to

> whether the action is to be maintained as a class action and, if so, the membership of the class. . . .
>
> "(d) If the party asserting the claim for or against a class fails to make a timely motion under subsection (c) of this rule, the opposing party *shall move*, within thirty (30) days after expiration of the time allowed for such motion, to dismiss the action as a class action. In ruling upon such a motion, the court may grant or deny it in the exercise of its informed discretion; may deny it, but award costs, expenses and counsel fees against the party seeking the maintenance of the claim as a class action or his counsel; or may grant such other relief as may be appropriate in all the circumstances." (Emphasis supplied)

The object of these local provisions, as Judge Gurfein has pointed out, is to permit "an *early* determination of whether the action is properly a class action 'and, if so, the membership of the class.'" *Wolfson* v. *Solomon*, 54 F.R.D. 584, 590 (S.D.N.Y. 1972) (Emphasis in the original). The duty to expedite that determination plainly rests with the plaintiff.

> "[T]he plaintiffs in a purported class action bear the burden of establishing that their action meets the prerequisites of Rule 23. [citations omitted] This burden imposes upon the plaintiffs in a purported class action the responsibility to move for formal certification of their class action by the court under Rule 23(c)(1). *Herbst* v. *Able*, 45 F.R.D. 451, 453." *Glodgett* v. *Betit*, 368 F. Supp. 211, 214 (D. Vt. 1973), *aff'd sub nom. Philbrook* v. *Glodgett*, 421 U.S. 707 (1975).

In the District Court such initiative must be undertaken within 60 days after the filing of the complaint unless the

Court orders that the determination should be postponed. Civil Rule 11A(c).*

The failure of plaintiffs to meet their responsibilities under Civil Rule 11A is regarded in the District Court with the utmost seriousness. In the words of Judge MacMahon,

> "The purpose of Rule 11A(c) and (d) is to prevent the parties in a class action from impeding the course and progress of the litigation by failing to move for a class action determination. Since the action cannot go forward until it has been determined to be a class action, it is important that a determination be made early in the litigation, as mandated by Rule 11A(c) and by Rule 23(c)(1)." *Walker* v. *Columbia University*, 62 F.R.D. 63, 64 (S.D.N.Y. 1973).

Likewise, Judge Brieant has declared that "[t]he local rule [Rule 11A] represents an important statement of policy which must be adhered to in the interests of justice in a field of litigation where the possibilities of abuse and oppression are ever present." *Sheridan* v. *Liquor Salesmen's Union, Local 2*, 60 F.R.D. 48, 51 (S.D.N.Y. 1973).

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* Numerous other Districts have prescribed specific time limits for bringing on class determination motions. *See, e.g.*, Eastern District of California (Rule 124(c)), District of the District of Columbia (Rule 1-13), Southern District of Florida (Rule 19A (3)), Northern District of Georgia (Rule 221.13), Southern District of Illinois (Rule 7(b)), Eastern District of Louisiana (Rule 2.12(c)), Southern District of Ohio (Rule 3.9.3), District of Oregon (Rule 17(c)), Eastern District of Pennsylvania (Rule 45(c)), Western District of Pennsylvania (Rule 701.07 (c)), District of Rhode Island (Rule 30(c), (d)), District of Vermont (Rule 11(3)), Western District of Washington (Rule 23(f)(3)). The District Courts clearly have the authority to promulgate local rules to regulate their practice in a manner not inconsistent with a federal statute or the Federal Rules of Civil Procedure. *See, e.g., Kreitzer* v. *Puerto Rico Cars, Inc.*, 417 F. Supp. 498, 502 (D.P.R. 1975).

Since the adoption of Civil Rule 11A in 1970, the District Court has repeatedly dismissed class allegations where the plaintiff has failed to move promptly for class determination as required by the Rule.* In several recent cases, in fact, the Court has on its own motion stricken the class allegations from the complaint because of the plaintiff's failure expeditiously to seek a class determination. *See e.g., Yulio* v. *Moore-McCormack Lines, Inc.*, 387 F. Supp. 872 (S.D.N.Y. 1975); *Jeffrey* v. *Malcolm*, 353 F. Supp. 395 (S.D. N.Y. 1973); *see also Kappelmann* v. *Delta Air Lines, Inc.*, 539 F.2d 165, 167 n.3 (D.C. Cir. 1976) (decided under local Rule 1-13 of the District Court for the District of Columbia, which establishes a 90-day period in which plaintiffs must move for class determination). The dismissal of the class claims in this case thus followed in the wake of a series of like decisions in which the mandate of Rule 11A was taken seriously and fully enforced.

B. Plaintiff's Inaction and Delay Were Proper Grounds For Dismissal

Despite the foregoing, plaintiff argues that the decision below should be reversed because dismissal of the class allegations constituted an "abuse of discretion" by the District Court. (Br. 12) While conceding the Court's power to order such a dismissal in the exercise of its "in-

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* *See, e.g., Crouch* v. *United Press International*, 10 Empl. Prac. Dec., ¶ 10,393 (S.D.N.Y. 1975) (Pierce, J.); *Walker* v. *Columbia University*, 62 F.R.D. 63, 64 (S.D.N.Y. 1973) (MacMahon, J.); *Wurzburger, Morrow & Keough, Inc.* v. *Keystone Co. of Boston*, 361 F. Supp. 627, 628-29 (S.D.N.Y. 1973) (Pollack, J.); *Beaver Associates* v. *Cannon*, 59 F.R.D. 508, 510 (S.D.N.Y. 1973) (Pollack, J.); *see also Herbst* v. *Able*, 45 F.R.D. 451, 453 (S.D.N.Y. 1968) (Motley, J.); *cf. Gilinsky* v. *Columbia University*, 62 F.R.D. 178, 179 (S.D.N.Y. 1974) (Lasker, J., requiring payment of costs, expenses and counsel fees).

formed discretion", plaintiff nevertheless urges that Judge Metzner was constrained to reach a different result in this case, and preferably to "impose no sanction whatever" for plaintiff's dereliction. (Br. 15)*

The claim that the Court below somehow "abused" its discretion under the facts of this particular proceeding can only be described as bizarre. In the instant case, the Court had before it not just an unexcused breach of Rule 11A, but a pattern of dilatory pretrial conduct that raised a real question as to the fitness of the plaintiff to be a class representative. Specifically, as of May 11, 1976, the return date of the class dismissal motion (38a), plaintiff concededly—

> (1) had gone more than 100 days since filing her alleged class action complaint without bringing on a motion for class determination;
>
> (2) was in default in responding to the Price Waterhouse interrogatories, which were addressed in large measure to the class question; and
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> (3) had failed to notice depositions or serve interrogatories to elicit information supposedly relevant to class determination, but never articulated.

Faced with such a pattern of neglect, the District Court acted well within its discretion in granting defendants' timely motion, just as it had in previous cases involving similar inaction. (*See supra*, p. 9.) Numerous other

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* This Court, of course, need not determine as an original matter that it would have reached the same result as Judge Metzner to sustain his ruling. *Cf. Paine, Webber, Jackson & Curtis, Inc.* v. *Inmobiliaria Melia de Puerto Rico, Inc.*, No. 76-7087 (2d Cir. October 12, 1976) (Slip op. at 71).

Courts throughout the country have reached the same result in cases involving like neglect.*

Undeterred, plaintiff insists that the Court's action must have been an "abuse" since plaintiff cannot discern any "prejudice" to defendants from her concededly negligent inaction. (Br. 12-28) Such thinking however overlooks the language and purposes of local Rule 11A, and the real effect of plaintiff's inaction on the defendants in this case.

Rule 11A embodies a policy decision of the judges of the Southern District that purported class actions must be promptly heard and that failure to do so is presumptively harmful, not just to individual defendants, but to the judicial process itself. Diligent handling of class allegations is essential "if the Courts are not to become bogged down by case load accumulations." *Adise* v. *Mather*, 56 F.R.D. 492, 495 (D. Colo. 1972). Nor is it proper for one of the parties to the action, rather than the Court itself, to be permitted to determine and control the pace of class action litigation.

Subsection (c) of the rule is thus a mandatory provision. The purported class representative is advised that he or she "shall move" within 60 days after the filing of an alleged class action complaint for a class determination. Meeting that basic requirement becomes the very first responsibility of any plaintiff who purports to serve as a class representative as soon as the complaint has been filed. Failure to act within 60 days, as was the case here, hampers and delays the public business of the Court and is by presumption prejudicial. *Walker* v. *Columbia Univer-*

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* *See, e.g., Kappelmann* v. *Delta Air Lines, Inc.*, 539 F.2d 165, 167 n.3 (D.C. Cir. 1976); *Beasley* v. *Kroehler Manufacturing Co.*, 406 F. Supp. 926, 930-931 (N.D. Tex. 1976); *Lau* v. *Standard Oil Co. of California*, 70 F.R.D. 526, 527, 528 (N.D. Cal. 1975); *Adise* v. *Mather*, 56 F.R.D. 492, 495 (D. Col. 1972).

sity, supra, 62 F.R.D. at 64. Were this not so, there would have been no reason for the Southern District expressly to have authorized its judges to strike unpursued class allegations upon timely motion by defendants. *See* Local Civil Rule 11A(d).

Beyond this general point, however, there remains the further fact that the defendants in this case—and Marine Midland Banks, Inc. in particular—have in fact been unfairly prejudiced by plaintiff's unexcused inaction.

As noted above, class action litigation is truly an area "where the possibilities of abuse and oppression are ever present." *Sheridan* v. *Liquor Salesmen's Union, Local 2, supra,* at 51.* No defendant should be compelled to labor indefinitely under the shadow of allegations of wrongdoing and concomitant claims for awesome damages. When the object of such charges is a respected bank holding company which trades in public confidence and which must report regularly on its affairs to the investing public, the Securities and Exchange Commission and state and federal banking authorities, swift disposition becomes all the more important.**

Delay in such a case, particularly prior to the class determination, inevitably increases the pressure on a corporate defendant to settle the matter and cast off the shadow of accusation. This Court has spoken bluntly about

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* A number of the federal district courts have even promulgated local rules aimed specifically at "Prevention of Potential Abuses of Class Action." *See, e.g.,* Local Rule 3.9.4, Southern District of Ohio, Local Rule 23(g), Western District of Washington.

** The New York legislature, explicitly recognizing the critical public importance of bank credibility, has enacted Banking Law § 671 (McKinney's 1971), making it a misdemeanor to spread false rumors of a bank's financial distress.

such class action pressures in a distinct but related context, observing that

> "So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits. But the preliminary procedures . . . have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim." *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018-19 (2d Cir. 1973) (dictum), *vacated*, 417 U.S. 156 (1974).

By bringing this action as a purported class action, plaintiff and her attorneys consciously compounded the risks to the defendants and the burdens for the Court. Those risks and burdens are by now a recognized part of practice in the federal courts. Nevertheless, it remains incumbent upon the party who imposes upon others the burdens of class action litigation to abide by the rules of practice intended to keep those inconveniences to a minimum. Defendants have a legitimate interest—which Rule 11A recognizes—in assuring that plaintiff's publicly alleged claims of fraud are resolved expeditiously, not at a leisurely pace convenient to a plaintiff whose attorneys are diverted by other more pressing or more promising matters.

Equally important, so long as this case were to remain a purported class action, the statute of limitations would be tolled as to the claims of all other purported class members, a factor of obvious concern to defendants. *See American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 552-553 (1974). Defendants were thus additionally prejudiced by being deprived of the opportunity to achieve a prompt resolution of the class question.

In contrast, no prejudice to the purported class has resulted from the granting of the class action dismissal. Any of the other members may yet bring his own independent claims, including class-based claims, on the same or related grounds. Plaintiff, too, may still press her claims on the merits, but not as a class representative.

If any abuse occurred in this case, it was plaintiff's abuse of the class action privilege in not having moved for a class determination within the time required by the District Court's rules, or indeed at any time thereafter. The Court below thus properly dismissed the action as a class action by the authority granted it under Civil Rule 11A(d).

C. The Authorities Cited By Plaintiff Are Inapposite

Plaintiff further contends that the decision below was an "abuse of discretion" because it was allegedly "contrary to the weight of reasoned authority." (Br. 12) In so arguing, plaintiff obviously ignores the great number of recent decisions, in the Court below and elsewhere, that have dismissed class allegations for the failure of the plaintiff to move promptly for class determination. (*See supra* pp. 9, 11.) Nor does plaintiff cite a single case in which such a dismissal has been overturned on appeal. To our knowledge, no such reversal has ever occurred.

What plaintiff does cite is a series of decisions which, where not simply inapposite, confirm the broad discretionary nature of the District Court's power to impose sanctions for a plaintiff's failure to make a timely class determination motion. Thus in *Gilinsky* v. *Columbia University*,*

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* 62 F.R.D. 178 (S.D.N.Y. 1974).

stressed heavily by plaintiff (Br. 12, 15-16), the District Court pointed specifically to "the proviso for exercise of discretion by the court in subdivision (d)" and approved payment to defendant of its "costs, expenses and counsel fees", one of the alternative sanctions provided for under the local rule. 62 F.R.D. at 179. In *Gilinsky*, unlike the present case, the plaintiff had in fact made the requisite motion, albeit belatedly.* Here, of course, no such motion was ever made, and indeed plaintiff now insists that it should be deferred still further pending discovery. (Br. 28 *et seq.*)

Similarly, in *Sanders* v. *Lum's Inc.*,** cited by plaintiff at several points (Br. 12, 16-17), Judge Motley emphasized the broadly discretionary character of the Court's power under Fed. R. Civ. P. 23(c)(1) and Civil Rule 11A, pointing out that

> "the application of these provisions by the courts has produced a great deal of flexibility in adopting to the particular fact patterns of individual cases. . . . Such exercise of judicial discretion has been frequently applied where the claim of untimeliness is raised in regard to a class certification motion." (¶ 95,536 at 99,717-8)

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* Equally inapposite are *Feder* v. *Harrington*, 52 F.R.D. 178 (S.D. N.Y. 1970); *Epstein* v. *Weiss*, 50 F.R.D. 387 (E.D. La. 1970); *Souza* v. *Scalone*, 64 F.R.D. 654 (N.D. Cal. 1974); and *Dickerson* v. *United States Steel Corp.*, 18 FR Serv2d 554 (E.D. Pa. 1974), since in each case the plaintiff had in fact made the motion and the defendant's timeliness objections had been raised solely in opposition thereto. In *Zolotnitzky* v. [illegible]*blok*, 1973-74 CCH Fed. Sec. L. Rep. ¶ 94,513 (S.D.N.Y. 1974), plaintiff had also belatedly moved for class determination, while defendants had cross-moved to dismiss the *entire* complaint under Fed R. Civ. P. 41(b). Local Civil Rule 11A was not invoked either by the parties or by the Court.

** 1975-76 CCH Fed. Sec. L. Rep. ¶ 95,536 (S.D.N.Y. 1976).

The Court observed in *Sanders* that the circumstances before it did not warrant dismissal, particularly since plaintiff had ultimately moved for class determination after a period of excusable inaction. (*Id.* at 99,718) Moreover, unlike the case at bar, defendants themselves had neglected to move for dismissal of the class allegations under Civil Rule 11A, a procedure which was plainly available to them and which Judge Motley indicates she would have entertained. (*Id.*)

More to the point is *Herbst* v. *Able*, 45 F.R.D. 451, (S.D.N.Y. 1968), decided prior to the adoption of Rule 11A (April 30, 1970) but which turned on essentially similar considerations. In *Herbst*, Judge Motley called a meeting of all counsel in 14 related cases and set a date six weeks later for plaintiffs to file motions on whether the actions should be maintained as class actions. The plaintiffs in at least seven of those actions failed to comply with the Court's deadline and did not make a timely motion seeking class determination. The Court thereafter dismissed the class allegations of those plaintiffs, explaining that

> "Although they were given the opportunity to do so, plaintiffs . . . did not seek to have their actions determined to be class actions. This Court, therefore, determines that these actions are not to be maintained as class actions. Indeed, by failing to so move these plaintiffs leave the court with no choice but to conclude that they will *not* 'fairly and adequately protect the interests of the class.' Fed. R. Civ. P. 23(c)(4)." 45 F.R.D. at 453 (emphasis in the original).

Local Civil Rule 11A is in essence the current, codified equivalent of Judge Motley's order in *Herbst* v. *Able*, and all counsel qualified to appear in the Court below are on

notice as to its provisions. Dismissal of class allegations for failure to comply with those provisions is a sanction expressly referred to in the rule itself. Accordingly, it cannot be an "abuse of discretion" for the Court to grant a motion for such dismissal where, as here, the rule has been violated without valid excuse.*

D. Plaintiff's Neglect Is Not Excused By Her Failure To Proceed With Discovery

Plaintiff finally asserts (Br. 40-45) that the Court below abused its discretion in dismissing the class allegations before plaintiff had undertaken discovery allegedly "necessary in order to define the parameters and membership of the class." Indeed, according to plaintiff, "such a motion would have been a total exercise in futility" and "could have resulted only in delay" without the prior taking of discovery. (Br. 29)

Such argumentation is pure makeweight. Plaintiff has at no time in this case served a single interrogatory or noticed a single deposition aimed at obtaining class-related information. Nor was any discovery needed to bring on a motion for class determination. As the District Court properly observed in passing upon this question when it was raised perfunctorily below (53a),

> "Discovery by plaintiff is not necessary to determine class action status. Plaintiff knows her relationship to the alleged wrongdoing. Class action orders are always subject to change as discovery proceeds." (60a)

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* This Court has recently affirmed the dismissal of an action with prejudice where plaintiffs' attorneys ignored discovery and trial deadlines set by the District Court. *Ali* v. *A&G Co.*, Nos. 76-7040, 76-7186 (2d Cir., September 29, 1976).

None of the cases cited by plaintiff (Br. 40-44) holds to the contrary.*

Plaintiff fails to distinguish between a determination of class status *on the merits* under Rule 23, Fed. R. Civ. P., or Local Rule 11A(c), and the determination that the Court below was called upon to make under Rule 11A(d)—namely, whether dismissal of the action as a class action was appropriate because plaintiff had (1) failed to move for class action certification, (2) failed to initiate discovery of any facts related to her class allegations and (3) failed to respond to interrogatories of defendants directly related to the class allegations. Those failures are conceded. The cases cited by plaintiff may establish that discovery can be *allowed* prior to a determination under Rule 11A(c); but no case holds that a plaintiff who ignores discovery is immune from the sanctions of Rule 11A(d), or that discovery must be completed before plaintiff's class determination motion can or should be made. Indeed, such a result would effectively cancel out Civil Rule 11A and the policies on which it is based.

The plaintiff's argument that discovery was required before the Court could have decided a motion under Local Rule 11A(c) simply provides further justification for the result reached below. Surely a party asserting its representative status may not properly delay the determination required under Rule 11A by simply failing to undertake the discovery it later claims to be a prerequisite to that determination. If appellant is correct that such discovery was

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* That discovery with respect to the propriety of class treatment may be appropriate in certain cases is not denied. Conclusive here, however, is plaintiff's failure to seek any such discovery or to specify the issues as to which discovery is "needed".

required prior to a determination of the merits of the class question under Rule 11A(c), then that very failure to initiate or respond to such discovery serves to emphasize the propriety of Judge Metzner's ruling under Rule 11A(d).

Had plaintiff truly been concerned to obtain "necessary" discovery, she would have found that Rule 11A provided her with ample opportunity to do so. Under Fed. R. Civ. P. 33, plaintiff was entitled to demand answers to interrogatories from defendants within 45 days after filing her complaint. *Davis* v. *Romney*, 53 F.R.D. 247, 248 (E.D. Pa. 1971). Responses to requests for admission and the taking of depositions could have been required in even less time. All of this was possible within the 60 days allotted under subdivision (c) of Rule 11A. If more time were needed, plaintiff could have sought a reasonable extension as the rule explicitly provides.

In actuality plaintiff's counsel did none of the above. Yet now, stressing the absolute importance of procedures they concededly and without excuse neglected, those counsel would have such neglect justify their further inaction with regard to the class determination motion.

The District Court rightly saw through such "bootstrap" sophistry and acted well within its discretion in dismissing plaintiff's class allegations.

II.

The Order Dismissing This Action As A Class Action Is Not Appealable.

Plaintiff's neglect extends beyond dereliction regarding the class determination motion and the failure to undertake discovery. She has further neglected to specify the jurisdictional basis for her appeal from the decision below. No appeal lies from such an interlocutory order unless plaintiff establishes appellate jurisdiction on some valid ground.

Title 28 of the United States Code, Section 1291, provides:

> "The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States. . . ."

Unless a decision of the District Court "fully and finally determines the action", that decision is not appealable unless a statute, rule of procedure, or specific judicial doctrine can be found that expressly authorizes it. *See generally* 28 U.S.C. § 1292, Fed. R. Civ. P. 54(b), 9 Moore, *Federal Practice* ¶¶ 110.06 *et seq.*, at 105 ff. (1975).

In the instant case, it is indisputable that the decision below did not fully and finally determine the action. To the contrary, the District Court made clear that, although the class allegations had been stricken, plaintiff was free to go forward with her own personal claim as before.

> "The action is dismissed as a class action [concluded the Court], but of course may be maintained as an individual action." (61a)

Thus, plaintiff's purported appeal is not from a "final decision", as required by 28 U.S.C. § 1291, and, in the absence

of certification by the District Court pursuant to 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 54(b), *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974), must be grounded upon some other predicate.

Plaintiff apparently relies upon the so-called "death knell doctrine" as the jurisdictional basis for this appeal (Br., 15n.), although no statement to that effect is made and no supporting argument is offered.

Under that theory of jurisdiction, this Court has permitted appeals to be taken from certain interlocutory orders of the District Court which would not otherwise be appealable where it was shown that the effect of such orders would be to sound "the death knell of the action." *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119, 121 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The doctrine has been invoked in a few purported class action situations where it was demonstrated that denial of class status (upon appropriate motion for class determination) would prevent the original plaintiff from going forward with the action on his own. *See e.g., Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971). The majority of the circuits do not accept the theory as articulated in the Second Circuit, and some have expressly declined to follow it because of the absence of sanction for it in Title 28 and the Federal Rules.*

But whatever view is taken of the doctrine as a matter of jurisdictional theory, it is plain that it should not be applied in this case because plaintiff has made no showing whatever that the prerequisites for applying it are present. In particular, plaintiff has not alleged, nor does the record show, that she would be unable or even unwilling to proceed

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* *See, e.g., Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *King* v. *Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973).

with the litigation solely in her own behalf as permitted by the Court below. Plaintiff's investment in the common stock at issue allegedly amounts to $1,800 (56a), and she has said nothing about whether other members of her family also invested in that stock, *see Korn* v. *Franchard Corp., supra,* 443 F.2d at 1306-07. Nor, for that matter, is there any evidence in the record regarding the extent of plaintiff's resources, the availability of other individual stockholders to join her or the anticipated cost of prosecuting the action.

A plaintiff who seeks to appeal an order denying class certification carries the burden of demonstrating that such denial will in truth terminate the litigation. *See, e.g., Share* v. *Air Properties G, Inc.,* 45 U.S.L.W. 2043 (9th Cir., July 6, 1976); *Gosa* v. *Securities Investment Co.,* 449 F.2d 1330 (5th Cir. 1971). As recently stated by the Ninth Circuit,

> "the plaintiff [must] demonstrate that the order complained of truly means the death of [the] action . . . . [T]he size of the individual claims, the extent of the plaintiff's resources and the probable expense of prosecuting the lawsuit are all factors relevant to the issue of viability." *Share* v. *Air Properties G, Inc., supra* at 2044. (citation omitted)

The record on this appeal is barren as to those factors for the very same reason that the class allegations were dismissed—plaintiff never moved for certification of the class and thus never put before the District Court a single fact to show that denial of class status would somehow end the lawsuit.

Plaintiff has treated the appealability of the District Court's order in the same cavalier manner as she did the basic class issue itself. In the absence of a clear showing that this Court has jurisdiction to hear an appeal of the

decision below, and in view of plaintiff's failure to create a record upon which to premise any purported "death knell" argument, the appeal should be dismissed.

CONCLUSION

The District Court properly dismissed this action as a class action under the discretionary authority vested in it under local Civil Rule 11A(d). In any event, the order granting dismissal of the class allegations is not appealable. For the reasons stated, the appeal from the order of the District Court should be dismissed.

Respectfully submitted,

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